Herlina Trisnawati v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B–05–95 OF 2004
MOKHTAR SIDIN, HASHIM YUSOFF AND MOHD NOOR ABDULLAH JJCA
17 SEPTEMBER 2007

Criminal Law — Penal Code — ss 302, 300 — Murder — Evaluation of evidence — Whether evidence shows appellant committed murder as defined under s 300

Criminal Law — Penal Code — s 304 — Murder — Whether act committed by appellant amounting to culpable homicide not amounting to murder

The appellant was charged in the High Court for the murder of one Soon Lay Chuan ('deceased'). The deceased was the female employer of the appellant who worked as a domestic maid. The deceased's dead body was found on 14 August 2001 in the house. At the end of the trial, the appellant was found guilty, convicted and sentenced to death. The appellant appealed.

Held, allowing the appeal

(1) The learned judge should have considered whether the evidence of the appellant had raised a reasonable doubt in his mind irrespective of whether he believed the evidence or not. The learned trial judge should have considered whether there was a probability in the evidence and not whether he believed the testimony or not (see para 25).

(2) The authority is clear that it is the rule that if a witness had lied on one or two points it did not necessarily follow that his whole evidence should be rejected and it is the duty or the court to sieve the evidence. The learned judge had erred in not evaluating the evidence of the appellant as a whole just because the appellant did not reveal truthfully how she got the injury (see para 31).

(3) Evaluating the evidence as a whole, the appellant did cause the death of the deceased but there was insufficient evidence to show that she had committed murder as defined under s 300 of the Penal Code (see para 35).

(4) The evidence showed that the appellant had committed culpable homicide not amounting to murder in that the act committed by the appellant was an act of causing such bodily injury as was likely to cause death when the appellant used the pestle to hit the deceased's head and followed up with a fight whereby she and the accused used knives to attack each other. This would come under the first limb of s 304 of the Penal Code (see para 35).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi kerana membunuh Soon Lay Chuan ('si mati'). Si mati adalah seorang pekerja wanita kepada perayu yang telah bekerja sebagai pembantu rumah. Mayat si mati telah ditemui pada 14 Ogos 2001 di dalam rumah. Di akhir perbicaraan, perayu didapati bersalah, disabitkan dan dijatuhkan hukuman mati. Peryau telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim perbicaraan sepatutnya memeprtimbangakan sama ada keterangan perayu telah menimbulkan satu keraguan munasabah dalam pemikirannya tidak kira sama ada beliau mempercayai keterangan itu atau tidak. Hakim perbicaraan yang bijaksana sepatutnya telah mempertimbangkan kemungkinan dalam keterangan tersebut dan bukan sama ada beliau mempercayai testimoni itu atau tidak (lihat perenggan 25).

(2) Autoriti jelas bahawa adalah merupakan satu peraturan bahawa sekiranya saksi berbohong satu atau dua perkara ia tidak semestinya keseluruhan keterangannya patut ditolak dan adalah menjadi tanggungjawab mahakmah untuk mengasingkan keterangan tersebut. Hakim yang bijaksana terkhilaf kerana tidak menilai keterangan perayu secara keseluruhan hanya kerana perayu tidak mendedahkan kebenaran bagaimana beliau mengalami kecederaan tersebut (lihat perenggan 31).

(3) Dengan menilai keterangan tersebut secara keseluruhan, perayu telah menyebabkan kematian si mati tetapi ia tidak mencukupi untuk menunjukkan bahawa beliau telah melakukan pembunuhan seperti yang ditafsirkan di bawah s 300 Kanun Keseksaan (lihat perenggan 35).

(4) Keterangan menunjukkan bahawa perayu telah melakukan homisid tidak bersamaan pembunuhan di mana tindakan yang dilakukan oleh perayu merupakan satu tindakan yang menyebabkan kecederaan pada badan yang juga berkemungkinan boleh menyebabkan kematian apabila perayu menggunakan anak lesung untuk memukul kepala si mati dan diikuti dengan satu pergaduhan yang mana si mati dan

tertuduh mengguankan pisau untuk menyerang satu sama lain. Ini terangkum di bawah cabang pertama s 304 Kanun Keseksaan (lihat perenggan 35).]

Notes

For cases on s 304 Penal Code, see 4 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1588–1596.

For cases on ss 302, 300 Penal Code, see 4 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1583–1586.

Cases referred to

Nor Hasnizam bin Ab Latif v PP [2002] 1 MLJ 154 (refd)
Ramiah v PP [1986] 1 MLJ 301 (refd)
Tan Buck Tee v PP [1961] MLJ 176 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)

Legislation referred to

Penal Code ss 300, 302, 304

Appeal from: Selangor Criminal Trial, No 45–30 of 2002

T Vijayandran (T Vijay & Co) for the appellant.
Noorin Badaruddin (Deputy Public Prosecutor, Attorney-General's Chambers) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court):

[1] The appellant/accused in the present appeal was charged in the High Court for the murder of Soon Lay Chuan on 14 August 2001 between 3pm and 4pm at house No 66, USJ 4/2, UEP Subang Jaya, Selangor. At the end of the trial she was found guilty, convicted and sentenced to death.

[2] The facts as found by the learned trial judge were that the deceased, Soon Lay Chuan, was the wife of Yegaraj a/l V Ramiah. They were married on 23 August 1997 and had no children. Yegaraj was a senior manager at Lefarge Malayan Cement and had lived at house No 66, US J 4/2, UEP Subang Jaya, Selangor since 1997. At the time of her death, on 14 August 1997, the deceased was unemployed. House No 66, USJ 4/2, UEP Subang Jaya is a double-storey terrace link house. On 14 August 2001, only three people lived in that house, that is Yegaraj, the deceased and their maid (the appellant). On the morning of 14 August 2001, Yegaraj took a flight from Subang Airport to Kota Bharu, on business. He was sent to the airport by the deceased at about 9.30am. That was the last time he saw her alive. At about

4.15pm, on 14 August 2001, when Yegaraj was in Kota Bharu, he received a call from his secretary. She told him that she had received a call from a policeman who had identified himself as Encik Shaffie ('SP8'). He had mentioned to her that he ('En Shaffie') had received a report that his (Yegaraj's) maid was bleeding. Yegaraj was further informed by his secretary that Encik Shaffie had told her that the maid refused to open the gate to allow Encik Shaffie into the house and that Encik Shaffie wished to contact him ('Yegaraj'). Yegaraj's secretary gave him Encik Shaffie's hand phone number and, thereupon, Yegaraj immediately contacted Encik Shaffie. Yegaraj was told by Encik Shaffie that his maid was bleeding and that she refused to let him into the house. Thereupon, Yegaraj told Encik Shaffie that he would contact his wife.

[3] Yegaraj attempted to contact his wife on her hand-phone but she did not answer the call. This was at about 4.15pm. Then, Yegaraj attempted to contact the deceased through the fixed house phone. However, it was the maid ('the appellant') who answered the phone. He asked her where the deceased was and she replied that the deceased had gone out. Yegaraj proceeded to ask her if a policeman had come to the house, whether he was still outside and whether there was any problem. She told him that the policeman was not there and that he had already gone. Yegaraj also asked the appellant if she was bleeding and she replied that she had cut her hand. During the trial, Yegaraj testified that the appellant had said: 'Saya terluka di tangan. Telah memotong ayam'. Yegaraj also testified that in that telephone conversation with the maid, over the fixed house phone, he had asked her whether she was still bleeding. She had replied, 'Tiada'. He testified that she had said it was a small cut and that when the deceased returns she will give her 'ubat'. Yegaraj testified that the appellant was very calm and her conversation was normal. Yegaraj did not suspect anything amiss, at all. He told her over the phone to wash her hands and bandage it, if possible, and that he would send someone to the house to take her to see the doctor.

[4] Soon thereafter, Yegaraj telephoned his colleague and friend, Simond Soon Lian Beng, to proceed to his house to check and see if there was any problem with the appellant, and if there was any bleeding that required the attention of the doctor, and to help take her to the nearest doctor. Subsequently, Yegaraj telephoned his house again, at about 4.30pm, from Kota Bharu. The appellant answered the house phone. Yegaraj told her that his friend would be coming to take her to the doctor. Yegaraj then continued his attempts to call the deceased on her hand-phone and although the phone was ringing, there was, however, no answer.

[5] At about 4.55pm, Yegaraj received a call from his friend, Simond Soon Lian Beng ('SP7'), who informed him that he was already at Yegaraj's house,

but the appellant refused to open the gate. Yegaraj then telephoned the house and the appellant answered the house phone. Yegaraj told the appellant that his friend was at the gate, and he asked her to open the gate and allow his friend into the house. Then, a few minutes later, Yegaraj received a call from Soon Lian Beng, who was standing at the gate, and he informed Yegaraj that the appellant still refused to open the gate. Soon Lian Beng also told Yegaraj that the deceased's car was under the porch. Until then, Yegaraj had assumed that the deceased was not in the house, and the car was also not in the house. Yegaraj asked Soon Lian Beng to pass his hand-phone to the appellant. As soon as the appellant took the phone from Soon Lian Beng, Yegaraj instructed her to open the gate, immediately. When the gate was opened, Soon Lian Beng entered the house and called Yegaraj again, in a state of anxiety, saying there were blood stains. Yegaraj could hear Soon Lian Beng asking the appellant where the deceased was and, why there was so much of blood stains. However, Soon Lian Beng's phone went off. Yegaraj tried calling back Soon Lian Beng and he managed to get him on the line after a few minutes. Soon Lian Beng told Yegaraj that he had sighted the deceased and that she was unconscious, lying in the bathroom. Yegaraj pleaded with Soon Lian Beng to check whether the deceased was alright and to do everything he could to save her. Subsequently, Yegaraj lost contact with Soon Lian Beng. However, he received a call later from Mr Mah, who had accompanied Soon Lian Beng to Yegaraj's house. He was told by Mr Mah that the deceased had probably passed away. By that time, Yegaraj was at the Kota Bharu airport to board a flight back home.

[6] Yegaraj arrived at KLIA at about 9.30pm. He proceeded to the Klang General Hospital. At the mortuary, he identified the body shown to him as that of the deceased, Soon Lay Chuan (his wife).

[7] Soon Lian Beng testified as to what he saw and did upon his arrival at Yegaraj's house close to 5pm on 14 August 2001, after receiving a telephone call from Yegaraj. He testified that at about 4pm on that day, he was having a meeting with a customer at his office, somewhere along Old Klang Road. His ex-boss, Mr Mah Poon Keat was with him. During the meeting, he received a telephone call from Mr Raj in Kota Bharu, requesting him to excuse himself from the meeting and, to proceed to his house, to check on his maid who was bleeding. He was informed by Mr Raj to fetch the maid to go and see the doctor. After receiving Mr Raj's phone call, Soon Lian Beng quickly finished the meeting with the customer and proceeded to Mr Raj's house, together with Mr Mah and his driver. The time was about 4.30pm to 4.40pm. When he arrived at Mr Raj's house, he stood in front of the gate and called the maid on the house phone, using his hand-phone. The maid answered the call. He told her that if she was bleeding, he needed to take her to the doctor. The maid replied that it was not necessary. He then asked her

to open the house main door but she refused. Thereafter, he contacted Mr Raj, telling him that he was standing in front of his house gate and that his maid has refused to let him in. He also told Mr Raj that his wife's car was parked in the car porch. Mr Raj told him that he would call the maid and ask her to let him in. About five minutes later, the maid opened the wooden door of the house and came to greet him in front of the gate. It was an auto gate and it was closed. She still refused to open the gate and let him in. She did not give any reasons for not opening the gate. At that time, he saw her hand, and noticed that the flesh between the thumb and the forefinger of the left hand was split open. He had asked the maid what had happened to her hand. She replied that she had accidentally injured her hand while cutting chicken. He told her that he needed to take her to the doctor. She refused. He insisted that she opened the gate to let him in, but the maid stood still, doing nothing. So he called Mr Raj again and told him that the maid was standing in front of the gate and refused to open it. He handed his hand-phone to the maid, for Mr Raj to instruct her to open the gate. Thereafter, she did open the gate and that was when he asked her where was Mr Raj's wife. She replied that she (Mrs Raj) had gone out with someone. When he asked her again whether Mr Raj's wife had gone out jogging, as it was evening, the maid said, 'no'. She replied, confidently that she (Mrs Raj) had gone out with someone. At that time, Mr Raj was still on the line with Soon Lian Beng on the hand-phone and, obviously, having overheard the conversation between Soon Lian Beng and the maid as to the whereabouts of the deceased, Mr Raj insisted that Soon Lian Beng go into the house and check it out.

[8] When Soon Lian Beng entered the living area of the house, he saw patches of blood stains on the wooden door separating the living area and the kitchen. At that time, the appellant was tagging behind the said Soon Lian Beng. He also noticed that there were blood patches underneath the aquarium beside the toilet door. The said Soon Lian Beng then raised his voice and asked the maid why there were so much blood splattered all over if she had only injured her hand while cutting chicken. At that time Mr Mah was outside the house. Soon Lian Beng called Mr Mah into the house. He came in but after he saw so much blood he walked out of the house. Mr Raj who was still on the line with Soon Lian Beng asked the latter to find the deceased. Soon Lian Beng asked the appellant again where was the deceased. The appellant gave the same answer that the deceased had gone out with someone.

[9] Soon Lian Beng saw on the floor, beneath the dining table, a big patch of blood stain. He also noticed that there was blood stains on the straw mat beneath the table. At that time he started calling for the deceased several times. He noticed the toilet door was shut closed and the utility room door, at the side of the toilet, ajar. He opened the utility door to check whether she

was inside. Then, he tried to open the toilet door but the appellant stopped him by placing herself in front of the door. She blocked his attempt to open the toilet door and uttered, 'Tak nak'. The said Soon Lian Beng raised his voice why she did not allow him to open the toilet door. She continued to stand in front of the door. At the time when the appellant was not looking at him, Soon Lian Beng lunged forward and opened the toilet door. There he saw the deceased lying prone on the toilet floor (with body flat down straight with head tilting towards the left). The deceased was drenched in blood. Soon Liang Beng noticed patches of hair, with skin of the scalp, lying on the toilet floor. The deceased was wearing a sleeveless T-shirt and shorts. He also noticed that near the deceased's leg there was a pestle and two knives. At the side of the body, Soon Lian Beng noticed a tall pail of water, red in colour (the water was red in colour). The body was placed straight, with the face facing downwards and left, with her two hands straight at her sides. Soon Lian Beng asked the appellant how the deceased could be in that position, but there was no answer. However, when he asked her how long Mrs Raj had been in that position, she replied, 'satu jam'. On the phone Soon Lian Beng informed Mr Raj that the latter's wife was found lying on the toilet floor injured. Soon Lian Beng checked the body pulse but could not detect any sign of life but the body was still warm. At the same time, Soon Lian Beng saw the appellant walking towards the backyard of the house and trying to open the back door to the house. On seeing that, Soon Lian Beng shouted to her not to walk away but to proceed to the living area and sit down on the sofa. The appellant obeyed. In the meantime, the said Soon Lian Beng shouted to Mr Mah to call for the police. The police arrived at about 5.30pm. The police told Soon Lian Beng to leave the place where the body was found and wait outside. At that time the appellant was still sitting on the sofa.

[10] Soon Lian Beng asked the police why there was no doctor or ambulance. Soon Lian Beng and the police were able to convince a doctor from a nearby clinic to examine the body of the deceased. The doctor confirmed that the deceased had passed away. The examination by the doctor was done at about 5.45pm. Soon Lian Beng testified that the doctor told the police that the deceased was already dead about 4–5 hours earlier. Soon Lian Beng further testified that all the time when the police was there the appellant was very calm and cool. She stuck to her story that she had accidentally injured herself while cutting chicken. The said Soon Lian Beng also testified that when the appellant came to greet him at the gate she was dressed in clean attire, ie a green T-shirt and knee length shorts. SP4 gave evidence that on the day of the incident at about 3.15pm she heard the sound of screams, moaning and crying coming from next door. She heard the appellant spoke in Indonesian dialect 'Nyonya saya mahu lari. Saya mahu pulang'. She told her husband SP.3 who then went over to investigate. SP3 gave evidence that he went to the back of the neighbour's house and stretched his neck to look into the house. He called out for Mr Raj and adik (meaning the appellant) but

there was no response, but he still heard the sound of moaning coming from the house. He then went back to the house and called the police. Even after he called the police he still heard the moaning sound which eventually stopped about 15 minutes after he made the call to the police. The police arrived at about 4.30pm. SP 4 gave evidence that when she stretched her neck and looked into the neighbour's house through the kitchen window she saw blood on the kitchen floor and near the sink.

[11] SP9 (Konstabel Asmi bin Obon) gave evidence that on 14 August 2001, at about 3.30pm he received a call from a male Malay telling him of a quarrel at No 66, USJ 4/2, UEP Subang Jaya. He then reduced that into a report and relayed the information to L/Kpl Saadon. At about 3.45pm, L/Kpl Saadon informed SP9 that he could not enter the house. At about 3.30pm on that day, L/Kpl Saadon was on crime prevention patrol with SP.6 (L/Kpl Abdul Aziz) and SP8 (L/Kpl Shaffie) in the Batu 3 area. At that time, SP6 received an information from the Balai Polis Batu 3, on his hand-phone, about a quarrel at house No 66, USJ 4/2, UEP Subang Jaya. On receiving the information the three of them went to the said address in L/Kpl Saadon's car and arrived there about 7–8 minutes after receiving the information. When they arrived at the said address they called for the owner from outside the electronic gate which was then locked. At first there was no response, but later the front door of the house was opened by the appellant. The police then identified themselves and enquired from the appellant whether there was anything that happened in the house. The appellant replied in the negative. SP6 asked the appellant to open the gate so that he could check to ascertain that nothing happened in the house. The appellant refused stating that the owner of the house was not in. SP6 then gestured to the appellant to come to the gate which she did. SP6 noticed that she had an injury on the hand and that the clothes she was wearing had blood stains on them. SP6 asked why her hand was bleeding and she replied that it was caused by a cut from a knife. SP6 then offered to send the appellant to a clinic to treat the wound but she refused. The police then left the house. SP8 corroborated the evidence of SP6. SP8 added that he attempted to contact the appellant's employer from a name-card given by a neighbour and only managed to speak to the employer's secretary since the employer was away in Kota Bahru. Eventually the employer contacted SP8 and when the employer told SP8 that his wife would take the appellant for treatment the police party left the house.

[12] SP15, the investigating officer (ASP Chin Khiam Kong), gave evidence that he arrived at the scene at about 7pm on 14 August 2001 and found a group of police personnel already there. Amongst them was C/I Hesli bin Daud, Kons/W Suhaida and police photographer Sgt Mohd Noor. The appellant was with Kons/W. Suhaida. C/I Hesli bin Daud showed the body of the deceased, lying prone in the toilet downstairs, to SP15.

SP15 examined the body and found injuries on the head and neck. He instructed Sgt Mohd Noor to take photographs of the deceased and the scene of crime. SP15 recovered and took possession of several exhibits at the scene of crime, including a blood stained mortar pestle, a blood stained small knife and a blood stained big knife. All the exhibits were found on the floor of the toilet, close to the feet of the deceased.

[13] SP12 (Dr Ab Halim bin Hj Mansor), a forensic pathologist at the General Hospital Kuala Lumpur, carried out a postmortem on the deceased, Soon Lay Chuan, on 15 August 2001 at about 3.45pm in Hospital Tengku Ampuan Rahimah Klang. On external postmortem examination, there were multiple stabbed, incised wounds, scratches and bruises on the face, neck, limbs and thorax regions. On internal postmortem examination, there were subgaleal haematoma of scalp, fracture skull, intra-cerebral haemorrhage at the frontal area, slashed and incised wounds on the right neck. SP.12 testified that the deceased's death was caused by severe head and neck injuries from blunt and sharp object. He also testified that the pestle (P26) could cause the intra-cerebral haemorrhage. Based on the injuries he saw on the deceased, the pestle must have been struck with strong force. He further testified that striking the head with a blunt object, like P26, would endanger the life of the victim. He also testified that the cut on the neck could become fatal, if not treated, and that the knives, P28 and P30, could have caused the injuries on the neck of the deceased.

[14] SP14 (Primulapathi a/l Jaya Krishnan), a chemist with the Chemistry Department, testified that he carried out DNA analysis on the several exhibits sent to him by the police in connection with this appeal. He testified that the DNA profile developed from the bloodstains on pestle (P26) and knives (P28 and P30) to be mixed profile originating from at least two sources. He testified the sources. Represented by blood specimen labeled 'Soon Lay Chuan' and blood specimen labeled 'Herlina Trisnawati', were consistent with being the contributors to this mixed profile.

[15] The learned judge at the close of the prosecution's case found that the prosecution had proved a prima facie case against the appellant, and accordingly called upon the appellant to enter her defence on the charge under s 302 of the Penal Code.

[16] The appellant testified that she was born on 22 May 1982 in Surabaya, Indonesia and came to Malaysia to work as a maid. She was brought to Malaysia by an agency known as Sri Manisa, and upon arrival in Malaysia, she was given two weeks training by the said agency, and, thereafter, sent to work at the deceased's house. She had worked at the deceased's house for about three months, immediately prior to her arrest on 14 August 2001.

The accused testified that her daily work at the deceased's house starts as early as 5am and finishes at about 11pm. Her workload was heavy and she was only given two meals daily, that is, at 3pm and 10pm or 11pm. She was not given breakfast. The appellant further testified that the deceased often scolded her and hit her whenever she made any mistakes in carrying out her tasks, and uttered to her 'Mak engkau mati'. She demonstrated to court how the deceased hit her near the ear using her hand, and claimed that she is deaf in the left ear till the day of the trial, as a result of the deceased's abuse, and alleges she suffers pain in the ear. The appellant also testified that on the date of the incident, that is, on 14 August 2001, she woke up at 5am, as usual, and commenced her duties. She could not remember whether the deceased had left the house at about 9am. She also could not remember whether the deceased and her husband had, at any time that morning, left the house together. She had cooked in the morning and at about 1.30pm she heated up the fish curry which had been cooked the day before. However, the fish curry got burnt. When that happened, the deceased scolded and hit her, saying 'Emak mati', 'Bodoh'. In her evidence the appellant stated that the deceased, at that time, had just come into the house and the deceased's husband was not at home. After the deceased had taken offence over the burnt fish curry, the deceased examined the grille which the appellant had cleaned. The deceased opened her bedroom and the appellant tidied the room whilst the deceased sat on the sofa downstairs, reading newspapers. The appellant gave evidence that the deceased was angry with the appellant over the grille in the toilet upstairs which the appellant forgot to clean. The deceased as usual hit the appellant and scolded her saying 'Emak mati', 'Bodoh'. After scolding and abusing the appellant the second time in a row that day, the deceased went and sat on the sofa and appeared to be sleeping. At that time the appellant was washing and cleaning the dishes in the kitchen. The appellant gave evidence that on that day her left hand was injured which was caused by the deceased. This was done during a fight between the appellant and the deceased. According to the evidence of the appellant the fight began when the appellant hit the deceased on the head with a pestle while the deceased was sleeping on the sofa. The appellant gave evidence that she hit the deceased's head with the pestle hoping that the deceased would fall unconscious and when the deceased fell unconscious she could run away from the house. She got the idea after seeing the TV. The appellant further stated that after she hit the deceased with the pestle, the deceased did not fall unconscious but instead woke up and went to the kitchen. The appellant did not know what the deceased did in the kitchen. The deceased took out a big knife from the kitchen cabinet which the appellant identified to be exh P30. The appellant in turn took out a small knife identified by the appellant to be exh P28. There was a fight between the deceased and the appellant. The appellant gave evidence that she could not remember how long the fight using the knife lasted. She also gave evidence that she could not remember how the fight ended. After the fight, she dragged the body of the deceased to the toilet.

She did not mop or clean the blood stains on the kitchen floor. Only after the deceased was put in the toilet she cleaned the kitchen floor. The appellant gave evidence that she did not hit the deceased with the pestle very hard. She stated that she had no intention to kill the deceased. The appellant also gave evidence that she hated the deceased for being abusive while the deceased's husband never scolded her.

[17] The learned judge after hearing the evidence came to a decision that the appellant was guilty of the offence of murder under s 302 of the Penal Code and convicted her. The learned trial judge then sentenced the appellant to be hanged. The appellant appealed against that decision to this court.

[18] Before us, learned counsel for the appellant raised several issues in his submission. We are of the view that some of the issues have no merit at all. We deal with the submission of the learned counsel which issues we feel have merits.

[19] The learned judge erred in fact and law when he failed to consider the nature of the injuries found on the victim is inconsistent with an inference of an intention to kill the victim.

[20] On this issue the learned counsel submitted that according to the postmortem report P7 and the testimony of SP12, it was the 'combination of all the injuries on the head and neck that caused the death' and the vital organs were all intact and even the carotid artery in the neck was intact. SP12 had stated that the injuries on the deceased appeared to have been caused by a person who had lost self-control and it was termed 'frenzy killing'. The learned counsel further submitted that the learned judge had agreed with the opinion of DW2, a pathologist called on behalf of the appellant who testified that the head injury could have been caused by a fall rather than the pestle. DW2 also said that 90% of the injuries on the body could not have caused death. The appellant then cited *Nor Hasnizam bin Ab Latif v Public Prosecutor* [2002] 1 MLJ 154 where Mohd Saari JCA after referring to *Tan Buck Tee v ublic Prosecutor* [1961] MLJ 176, said that on the question of intention to kill, it is a matter of inference from the nature of the wounds. In Tan Buck Tee, Thompson CJ made the following observation:

> There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted

[21] The trial judge erred in fact and law when he rejected the sworn testimony of the appellant that she hit the victim on the back of the head

while she was sitting on the sofa in the hall for the purpose of running away and substituted it with a version unsupported by the evidence and indeed contradictory to the Prosecution version.

[22] It was submitted that the appellant was scolded as always because she burnt the fish curry and forgot to clean the grille at the toilet. As always the phrase used by the deceased was 'Emak engkau mati, bodoh'. The evidence shows that after scolding the appellant, the deceased sat on the sofa and appeared to have snoozed. The appellant was then in the kitchen washing and cleaning the dishes. The appellant gave evidence that she decided to run away from the deceased's house. In order to do that the appellant had to hit the head of the deceased so that the deceased would fall unconscious and as such the deceased could not stop the appellant from running away. The appellant gave evidence that she did not hit the head of the deceased with the pestle that hard and as a result the deceased woke up and went to the kitchen and seized a big knife. The appellant also went to the kitchen and on seeing the deceased had a big knife, the appellant took a small knife. (Both the knives were produced as exhibits together with the pestle). Thereafter, there was a fight between the two of them. The prosecution in cross-examining the appellant put it to the accused the following: 'Katakan selepas awak mula-mula mengetuk kepala puan dengan lesong ketika puan di sofa, puan telah bangun untuk melarikan diri ke pintu belakang?' The appellant in her evidence said that the deceased collapsed on the kitchen floor after the fight. After that the appellant dragged the deceased to the toilet and the appellant than cleaned the kitchen floor. In respect of the evidence as adduced by the appellant the learned trial judge came to the following conclusion as seen in his judgment:

> Since the head and neck injuries were the direct cause of the death of the deceased, the only issue to be determined is whether the said injuries were caused, directly or indirectly, by the acts of the accused, with the intention to kill the victim or with the intention of causing such bodily injury sufficient in the ordinary course of nature to cause death to the victim. The determination of the degree of force with which the pestle was in fact used cannot be of paramount significance in relation to the charge. In any event, DW2 only 'expected' a depressed fracture of the right and left frontal bones if a heavy blow had been dealt on the forehead with the pestle. He did not expressly state that a heavy blow had not in fact been inflicted with the pestle. DW2 did express the opinion that a heavy fall on the floor striking the forehead could have caused a fracture of the right and left frontal bones, and also the underlying brain haemorrhage. Therefore, upon a careful scrutiny of all the evidence, I am of the opinion such a fall could very well have taken place, immediately upon the accused striking the victim with the pestle on the head from the back, after taking the victim by surprise, whilst she was seated or standing at the table in the kitchen and, thereafter, attacking her with the knives, in an overkill. The large patch of blood stain found on the kitchen floor near the dining table and on the straw mat under the table in the kitchen, is extremely suggestive of the

accused having attacked the victim in the kitchen and not in the living area where the sofa is seen, with hardly any trace of blood in that area (see photographs exhibit P4F and I, in contrast to P4C and D. See also evidence of Soon Lian Beng, SP7 as follows:

> … sensing something very wrong, I took a few steps backward and I could see on the floor beneath the dining table a big patch of sign of blood stains being mopped. I noticed too, there was blood stains on the straw mattress underneath the dining table.'

I am of the opinion the accused was not telling the whole truth when giving her evidence on oath. I formed the impression that she was very angry and annoyed with her employer, the deceased, from the time she started her employment and was harbouring an intent to seek vengeance in some form or other. Nevertheless, I am of the opinion she has exaggerated and fabricated the alleged physical abuse of her by the deceased, and there is no truth in it at all. I think she is completely lying when she testified that she is deaf in one of her ears as a result of the physical abuse. She has not complained to anyone about it or sought medical attention for the pain in the ear, she is allegedly suffering. She has told a complete lie in testifying that her injury to her left hand had been inflicted by the deceased when the deceased quarreled with her that day. She did not explain how the injury was inflicted by the deceased in the quarrel. This testimony tells very unfavourably as to the credibility of the accused, in the light of the evidence of the prosecution witnesses who testified that she told them the injury was occasioned (accidentally) when she was cutting chicken. She, therefore, cannot be believed on her testimony that upon being struck with the pestle, the deceased ran up to the kitchen cabinet drawer and pulled out a big knife (P30), purportedly to attack her, whereupon she drew out a small knife (P28) from the drawer, and a fight ensued. If the accused's version of the event is in fact true, and having seen both the said knives produced in Court, I am of the opinion, considering the size of P30, the accused would have been mortally wounded.

The accused's testimony that her intention to strike the deceased with the pestle was only to make her faint, in order that she could run away, cannot be believed, as the accused could have easily run away since the deceased was at that time, according to the accused, sleeping on the sofa. If her primary intention was to run away that day because she could not take the alleged physical and verbal abuse of her employer anymore, then, the accused could have easily done so without any need to make her faint while she was sleeping on the sofa. She also had ample opportunity to run away, at any time before the deceased returned from the airport after sending off her husband to Kota Bharu, if an intention to cause death to the deceased that day was never in her mind at all.

Upon a careful evaluation of her testimony on oath, the accused's testimony that she had no intention to kill the deceased, cannot be accepted. She was angry and annoyed with the deceased for reprimanding her. Her act of striking the deceased with the pestle was clearly a premeditated act. She was in the kitchen washing dishes when she decided to hit the deceased with the pestle. At that time, she had come down to the kitchen after cleaning the window of the toilet upstairs. Under cross-examination she testified:

> Saya pukul puan pada belakang tengkuk semasa puan sedang tidur atas sofa.
>
> Sebelum itu saya berada di dapur cuci pinggan-mangkuk selepas turun dari atas mencuci tingkap tandas.
>
> Semasa cuci pinggan-mangkuk di dapur saya terfikir untuk pukul puan dengan anak lesong.

> Since the act to strike with the pestle was pre-meditated, I find, upon the totality of the evidence, the intention to kill was also premeditated. This is further clearly demonstrated in the use of the two knives which were well within her reach in the drawer, near the sink, where she was washing up the dishes. The injuries inflicted repeatedly with the knives by the accused is a clear manifestation of an intention to kill. She had taken the most opportune moment to attack the deceased, who could have hardly put up any resistance to save herself. I am also of the opinion there was an intention to kill, as otherwise the accused would have sought the help of the neighbour to get medical help for the deceased, immediately after the alleged quarrel with the knives. If there had been no intention to kill the accused there would have been no necessity to prevent the discovery of the body of the deceased by SP7 or the need to lie that the deceased had gone out with someone, when the accused was fully aware that the body was in the toilet, as she herself had dragged the body from the kitchen and placed the deceased in the toilet and closed the door. Her failure to disclose the alleged fight with the deceased with knives, or of anything amiss in the house to the police personnel who first came to the house at about 3.40pm (SP6 and SP8), is inconsistent with innocence or the fact the deceased had in fact attacked her with the big knife (or any knife for that matter). It is my finding that there was no fight with knives between the deceased and the accused, at any time. On the evidence before me, it is also my finding, that the deceased did not use any weapon to inflict any injury on the accused. On the contrary, it is my finding that the accused used the two knives, either simultaneously, or, one at a time, to inflict the injuries that are attributed to a sharp weapon by the pathologist. I reject her defence that she had no intention to kill or cause the death of the deceased.

[23] On the above finding of the trial judge the learned counsel for the appellant submitted that the learned trial judge had misdirected himself. The appellant's counsel submitted that the learned judge had accepted the evidence of DW2 that the deceased might have fallen down heavily on the floor on the floor striking the forehead could have caused a fracture of the right and frontal bones, and also underlying brain haemorrhage. According to SP12 who conducted the post-mortem on the deceased the possible cause of death was: (1) the wound on the neck; (2) the wound on the head; and (3) the intra cerebral haemorrhage.

[24] We agree with the appellant's counsel that there was a misdirection by the learned trial judge when he accepted the evidence that the injuries to the head were caused by a heavy fall on the floor and then stated that there was

actually no fight between the deceased and the appellant. Further, he refused to consider the evidence of the appellant that the fight began in the living room when the appellant hit the deceased with the pestle while the deceased was sleeping on the sofa on the ground that there was no bloodstain in the living room. The appellant gave evidence that she hit the deceased's head with the pestle but not hard enough and this awakened the deceased who then went to the kitchen where she took a big knife. We believe that the blow by the appellant was not hard enough to create any wound and as such there was no blood at all. Most of the blood stains were found on the kitchen floor and the straw mat under the table in the kitchen which indicated the big fight took place in the kitchen where the deceased was armed with a big knife and the appellant was armed with a small knife and the pestle resulting with the deceased falling heavily on the kitchen floor wounded. Bearing in mind that after the blow on the head with the pestle, the deceased must have been in a daze and as such she could not defend herself properly even though she had a big knife with her. The evidence of the chemist clearly shows that the blood stains on the knives consisted of the deceased's and the appellant's which indicated there was a fight between the two where both parties were wounded. In our view, if the evidence as found by the learned judge is to be accepted then the blood stains of the appellant could not be found on the knives.

[25] The appellant's counsel further submitted that the trial judge erred in law and in fact when he rejected in toto the sworn statement of the appellant in respect of the fact that the appellant hit the deceased on the head while the deceased was sleeping on the sofa in the hall. We have stated our view above and we feel the learned judge had misdirected himself in this respect. It is a misdirection by the learned judge when he stated that he did not believe the evidence of the appellant. In our view, the learned judge should have considered whether the evidence of the appellant had raised a reasonable doubt in his mind irrespective of whether he believed the evidence or not. In this respect, we would say that the learned trial judge should have considered whether there was a probability in the evidence and not whether he believed the testimony or not.

[26] In his submission, the appellant's counsel stated that the reason the appellant wanted to run away was after she was scolded by the deceased twice in less than a few hours and the words used by the deceased, 'Emak engkau mati, bodoh!'. To some people reference to their mother being dead and being called stupid may be offensive and to some they are not. The appellant's counsel also attacked the finding of the learned trial judge when he said "Therefore upon a careful scrutiny of all the evidence, I am of the opinion such a fall could very well have taken place. Immediately upon the accused striking the victim with the pestle on the head from the back, after taking the

victim by surprise, whilst she was seated or standing at the kitchen and thereafter attacking her with the knives in an overkill". The appellant's counsel submitted that the learned judge clearly misdirected himself when he said that the appellant had attacked the victim with the knives in an overkill after she had fallen to the ground. If it was true that the appellant had in fact used the knives on the victim in an overkill after she had fallen as suggested by the learned judge than surely the knife injuries would not have been mainly superficial and slash long cuts but rather deep penetrating wounds.

[27] The appellant's counsel submitted further that the learned judge seriously misdirected himself and erred in law when he stated categorically that the distinction between culpable homicide not amounting to murder and murder is only if any one of the five exceptions set out in section 300 of the Penal Code applies. The learned judge in his judgment stated as follows:

> Having reject her defence and testimony that she had no intention to kill, it is now for me to consider whether she is guilty of murder under s 302 Penal Code or only guilty of culpable homicide not amounting to murder under s 304 Penal Code. The accused would not be guilty of murder only if any one of the 5 exceptions set out in s 300 is applicable. However I am of the view that only exception 1 and exception 4 needs consideration in the case of the present accused before me

[28] We agree with the learned counsel because the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 where at p 176 Raja Azlan Shah FJ (His Majesty as he then was) said:

> We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of s 299, Penal Code and s 300, Penal Code.
>
> Section 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is likely to cause death; (c) with the knowledge that … the act is likely to cause death.
>
> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and … is sufficient in the ordinary cause of nature to cause death; (4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.
>
> The words which I have italized show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if

it is the most probable result, it is murder. Illustration (d) of s 300, Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300, Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300, Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder punishable under s 304, Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300, Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300, Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of section 304, Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, clauses (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, clauses (2) and (3). The second part of s 304, Penal Code covers cases falling within the third part of s 299 not falling within s 300, clause (4).

In the present appeal we think that in view of the nature of the injuries sustained by the deceased and the time and place of the incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. Therefore in those circumstances, the fine distinction between s 299 and s 300 is very important and that point should have been put clearly to the jury in such a way that they would be able to come to a correct conclusion. The forensic practice of reading section 299 and s 300 to juries is likely to confuse rather than help. In view of what we have stated above, a case such as the present must therefore fall within the second part of s 299 or the third clause of s 300. Speaking generally, if the act must in all probability cause death, the offence is within s 300, Penal Code, and if the act is only likely to cause death, the offence falls within s 299, Penal Code. …

[29] In *Ramiah v Public Prosecutor* [1986] 1 MLJ 301, Lee Hun Hoe CJ (Borneo) (as he then was) at page 302 said:

A In our view an offence may amount to culpable homicide under section 304 of the Penal Code even though it does not come within any of the exceptions under s 300 of the Penal Code. If the exceptions under section 300 are not applicable then the learned judge should not refer to them as they may confuse the jury in their consideration.....

B

[30] The appellant's counsel also submitted that the learned judge erred in fact and law when he rejected the appellant's entire version solely because she had given a different version at the time of the incident to certain people where the learned judge in his judgment said:

C

…. She has told a complete lie in testifying that her injury to her left hand had been inflicted by the deceased when the deceased quarrelled with her that day. She did not explain how the injury was inflicted by the deceased in the quarrel. The testimony tells very unfavourably as to the credibility of the accused, in the D light of the evidence of the prosecution witnesses who testified that she told them the injury was occasioned when she was cutting chicken. She therefore cannot be believed on her testimony that upon being struck with the pestle, the deceased ran up to the kitchen cabinet drawer and pulled out a big knife (P30) purportedly to attack her, whereupon she drew out a small knife (P28) from the drawer and a fight ensued. If the accused's version of the event is in fact true, and having seen both E the said knives produced in court, I am of the opinion, considering the size of P30, the accused would have been mortally wounded.

[31] The authority is clear that it is the rule that if a witness had lied on F one or two points it did not necessarily follow that his whole evidence should be rejected and it is the duty or the court to sieve the evidence. In the present appeal the learned trial judge took the view that because the appellant did not explain the injury on her hand truthfully when asked by the police and Soon Lian Beng her testimony should be disbelieved. With the greatest respect to G the learned judge the appellant said those words before the body of the deceased was found. She said this when those witnesses were outside the gate. Did the learned judge expect the appellant to tell the truth about the injury, ie that she received the injury after she had killed the deceased which in our mind would be an admission by her as to the offence. Even if she had said H that she suffered the injury after a fight with the deceased, it would be not telling the truth. We agree with the learned counsel that the learned judge had erred in not evaluating the evidence of the appellant as a whole just because the appellant did not reveal truthfully how she got the injury.

I **[32]** The appellant's counsel also submitted that the learned judge misdirected himself when he said there was no fight between the deceased and the appellant at any time which is against the testimony of several witnesses. SP2 gave evidence that while he was at the Inquiry Office at Balai Polis USJ at about 3.30pm on 14 August 2001, he received a phone call from a

neighbour of the deceased stating that there was a quarrel at the deceased's house. This was reduced to a report which was produced in court. SP2 then conveyed the information to the police on patrol. That information was received by three policemen on patrol namely, SP6, SP8 and Kpl Saadon. They went to the deceased's house and there after calling the owner of the house the appellant appeared. By that time it was quiet in the house and the appellant appeared to have injured her hand and her clothings had blood stains on them. Then there was the evidence of SP3 and SP4, the deceased neighbour. SP4 gave evidence that at about 3.15pm while she was in the kitchen preparing lunch she heard a voice shouting. She opened the kitchen door to make sure from where the voice came from. She discovered that the voice came from the deceased's house. The shouting was mixed with crying and moaning of which some of the words she heard were, 'Nyonya saya mahu lari. Saya mahu pulang'. SP3 went to the upstairs of her house and told her husband (SP4) about that. SP4 who was doing some scanning on his computer upstairs then came down and then went to the back of his house and called "Raj" meaning the husband of the deceased and 'adik' meaning the appellant. There was no response from both of them but the shouting was still on.

[33] We agree with the appellant's counsel that what happened above show a strong indication that there was a quarrel or at least a commotion in the house at the time of the incident. The learned judge did not consider this in the light of the testimony of the deceased in court. On the other hand, the learned trial judge brushed this aside and came to the conclusion that there was no fight at all and that the appellant did a frenzy killing and overkill the deceased. We could not see evidence to support this conclusion by the learned judge. At most we could come to the conclusion that at most from the evidence the appellant did kill the deceased since there were only two of them in the house. How the killing came into being is anybody's guess, but there is evidence to show that there were bloodstains on the kitchen floor, the deceased's clothing, the appellant's clothing, the pestle and the two knives being used.

[34] The learned counsel raised other issues such as provocation and private defence but we see no merit in them.

[35] We are unanimous that on the evidence before the court the learned judge had erred in coming to the conclusion that the appellant had committed murder on the deceased. Evaluating the evidence as a whole we find that the appellant did cause the death of the deceased but there is insufficient evidence to show that she had committed murder as defined under s 300 of the Penal Code. The evidence shows that the appellant had committed culpable homicide not amounting to murder in that the act

committed by the appellant was an act of causing such bodily injury as is likely to cause death when the appellant used the pestle to hit the deceased's head and followed up with a fight whereby she and the accused used knives to attack each other. This would come under the first limb of s 304 of the Penal Code. We therefore set aside the conviction for murder and substituted it for culpable homicide not amounting to murder under the first limb of s 304 of the Penal code. We hereby sentenced the appellant to 18 years imprisonment.

Appeal allowed.

Reported by Brendan Navin Siva